COBURN & GREENBAUM PLLC

Barry Coburn
Admitted DC, MD, VA
Direct Dial: 202-643-9472

March 20, 2012

VIA E-MAIL AND FIRST-CLASS MAIL

David P. Berry, Esq.
Inspector General
National Labor Relations Board
Washington, DC

Re: Terence Flynn

Dear Mr. Berry:

I write to you as counsel for Member Terence Flynn. This letter responds to your e-mail of 7 p.m. last night. In your e-mail, you stated:

> The attachment is the OIG report regarding Mr. Flynn. We will provide copies of the report to the NLRB's Congressional oversight committees tomorrow at 4 pm. If you elect to provide comments on the report, we will include them when we transmit the report to the committees. Copies of the investigative exhibits are available, however, I cannot provide them electronically.

This affords us less than tweny-four hours to comment on your report. Further, we are required to comment without access to the documents in question. We immediately raised this issue in an email to you, but you have declined to make the exhibits available to us.

We strenuously object to your report for the following reasons:

- You have not afforded us remotely adequate time to review and comment on your report, particularly given our lack of access to the exhibits. There is no legitimate reason for not allowing us more time to review and comment, or for refusing to make the exhibits available to us, particularly since we saw some of them during Mr. Flynn's transcribed interview.

- You have included material that you believe supports your conclusions, but omitted material and information that refute them. Some of this information is described in

more detail below.

- The conduct at issue here is innocuous. You allege that Mr. Flynn's interface with prior Board members about substantive issues is improper, and does not constitute legitimate "outreach," but you provide not a trace of caselaw or other authority supporting this proposition. As we stated in Mr. Flynn's interview, a Board Member's or Counsel's job is not to live in an isolated bubble, but rather to be appropriately available to those outside the agency, and to interact meaningfully with the Board's constituency. That is precisely what Mr. Flynn did. To the extent Mr. Flynn used his office computer to, *e.g.,* comment on an acquaintance's business plan, this is a *de minimus* personal use of government office equipment which is expressly permitted under applicable rules. Similar material would be found on virtually every office computer in the United States government. The notion that such conduct constitutes "conversion," or theft, is baseless. Again, you provide no trace of case authority or other support for this contention.

- You made no attempt whatsoever to determine whether Mr. Flynn's use of his office computer was typical or atypical within the NLRB.

- Mr. Flynn disclosed nothing of any substance constituting agency "deliberative information." To the extent he may have, on one occasion, forwarded an email that reprinted an earlier e-mail from someone else, this was a non-substantive error and inadvertent oversight on Mr. Flynn's part.

- Most troubling is your "finding" that Mr. Flynn exhibited a lack of candor during his voluntary interview with you. This contention is without substance. There is no basis for discrediting anything Mr. Flynn said to you during his interview. With respect to Mr. Flynn's misdirected e-mail to Mr. Schaumber, we note that you make no reference to the copy of the email that we provided to you, following the interview, authenticating Mr. Flynn's assertion that he sought to recall one such email to Mr. Schaumber.

- Your decision to release this report directly to congressional oversight committees, knowing that it is then overwhelmingly likely to be made public, is an improper use of your authority as Inspector General, particularly in light of Mr. Flynn's politically sensitive recess appointment.

With respect to the specific e-mail exchanges and allegations set forth in the report, we offer the following comments, which, due to the time constraints you have imposed, are not exhaustive but serve to highlight the way in which the report mischaracterizes certain exchanges and provides an incomplete picture of Mr. Flynn's interactions with certain individuals:

(a) Communications with Former Member Peter Kirsanow:

The report casts certain email exchanges relating to Mr. Flynn's interactions with former Member Kirsanow in a misleading light. In or around September 2011, former Member Kirsanow called Mr. Flynn to ask if the NLRB retained a binder or other compendium of material relating to the legal challenge to the Board's healthcare rulemaking during the late 1980's-1990's. The Agency's library retains a wealth of materials relating to the Board, its proceedings, and the legislative history of the National Labor Relations Act which practitioners can and do seek to access. In response to former Member Kirsanow's request, Mr. Flynn asked the Agency librarian if any compendium on the legal challenge to the rulemaking was "lurking around the library somewhere." Mr. Flynn did not ask the Agency Librarian to undertake any independent research; he only asked whether those materials existed in the library. The Librarian informed Mr. Flynn that the Agency did not have the materials and that the only way to obtain the documents would be to request them from the court or to seek to retrieve them from off-site storage. When the Librarian asked Mr. Flynn if he wanted him to start the process of retrieving the case file from the court, Mr. Flynn specifically told him no. Mr. Flynn then relayed to former Member Kirsanow what the Agency librarian reported, and told former Member Kirsanow that he would have to find the documents elsewhere. There is nothing inappropriate or unusual about responding to a practitioner's request for information about what materials the Agency's library maintains.

On September 19, 2011, Mr. Flynn also forwarded an e-mail to former member Kirsanow with a copy of a publicly available complaint filed by another party. At the time, Mr. Flynn did not notice that the e-mail he forwarded to former member Kirsanow included a prior internal e-mail indicating that the Board might seek to consolidate two related cases. This disclosure was inadvertent and innocuous.

(b) Interactions With Attorneys At Mr. Flynn's Prior Law Firm:

You also have mischaracterized Mr. Flynn's interactions with colleagues from one of his former law firms, who contacted Mr. Flynn on a few isolated occasions to ask about Board law or procedure. Agency attorneys routinely respond to questions from practitioners regarding Board decisions, practices and procedures, which is exactly what occurred here. Moreover, we are aware of no prohibitions, and the IG has cited none, against an Agency official expressing his or her opinion on published Board decisions. Although you quote liberally in the body of the report from utterly irrelevant e-mail exchanges, you do not include the text of the e-mails between Mr. Flynn and colleagues from his former firm. Those e-mails reflect on their face that there was nothing inappropriate in the communications. Solely by way of example, the following e-mail exchange is representative of Mr. Flynn's communications with his former colleagues:

From: [redacted]
Sent: Friday, September 16, 2011 10:21 AM

To: Flynn, Terence F.
Subject: Pre-recognition Issues

Hi Terry:

Last year, the Board's majority ruled in the "other Dana case" that it was OK, at least in some circumstances, for an employer and union to enter into the agreements concerning certain terms and conditions of employment -- what I might call the architecture of a CBA -- prior to recognition without running afoul of Majestic Weaving/Altman-Bateman, etc. But, the majority didn't identify any sort of bright line as to what could be agreed to and what couldn't be, and said each case would be decided on a case by case basis. Just curious, do you know whether there are any cases dealing with this issue in the aftermath of the other Dana case?

GG

From: Flynn, Terence F. [mailto:Terence.Flynn@nlrb.gov]
Sent: Friday, September 16, 2011 10:24 AM
To: [redacted]
Subject: RE: Pre-recognition Issues

Not that I know of. I'm sure they are percolating, but I have not seen one presented for our consideration yet.

Similarly, you appear to be relying on certain e-mail exchanges in which Mr. Flynn conveyed his personal opinion or prediction about certain cases, which, in at least one instance, turned out to be contrary to the final outcome. Your report does not clarify that Mr. Flynn was providing his personal opinion, but instead arrives at the unsubstantiated conclusion that Mr. Flynn was disclosing confidential or deliberative information. Because you have refused to provide us either electronic or hard copies of the exhibits to the report, and because we have been provided such a short period for responding, we are unable at this time to address specifically and to provide the full context of the other exchanges between Mr. Flynn and colleagues.

(c) Interactions with Former Chief Counsel Lopatka

In November 2011, Mr. Flynn had an exchange of e-mails with Ken Lopatka, a former Chief Counsel to Chairman Battista, and a friend and close former colleague. Mr. Lopatka asked Mr. Flynn to review and comment on a law review article on which he was working. These exchanges are detailed at paragraphs 15 -16 of your report. During the course of their exchange, they discussed a pending case, D.H. Horton, which was a subject of Mr. Lopatka's article. Mr. Flynn expressed his opinion that D.H. Horton might not issue because he understood that Member Hayes was recused from the matter. At that time, there

were only two other Board Members. Thus, the issuance of the case could have raised a potential issue under the Supreme Court's recent decision in New Process Steel, which held generally that the Board could not issue decisions without a quorum of three participating members. Mr. Flynn's opinion about whether the Board would issue D.H. Horton was wrong – the Board did issue the case with Member Hayes recused. At the time of his discussion with Mr. Lopatka, Mr. Flynn was under the impression that Member Hayes had recused himself due a conflicting financial interest, which would have been a matter of public record in his Office of Government Ethics filings. It was only during the IG interview that Mr. Flynn learned that there might be other reasons for Member Hayes' recusal. Mr. Flynn had no reason at the time to believe Member's Hayes' recusal was somehow non-public.

(d) Interactions With Former Member and Chairman Schaumber

Mr. Flynn served as Chief Counsel to former Member and Chairman Peter C. Schaumber from December 2003 through August 2010, when then Member Schaumber's term expired. Mr. Flynn explained that to the best of his knowledge former Member Schaumber has not been engaged in the practice of law after leaving the Board and has not represented any individual or entity in any matter before the Board. Like other former Board Chairmen and Members, however, former Member Schaumber maintained an interest in matters relating to the Board and frequently spoke and wrote about them. Like other former Chairman and Members, former Member Schaumber also kept in touch with former colleagues, including Mr. Flynn. Mr. Flynn readily acknowledged that, at former Chairman Schaumber's request, he reviewed and commented upon a few op-ed pieces Member Schaumber hoped to publish. He also responded to various questions from former Chairman Schaumber about issued Board decisions and other matters. These interactions, to the extent the occurred through government issued equipment, were *de minimus* and in no way constituted excessive or improper use of government equipment.

For the foregoing reasons, we strenuously object to your report and to its provision to congressional oversight committees.

Sincerely,

Barry Coburn

1710 Rhode Island Avenue, NW · 2nd Floor · Washington DC 20036
202.657.4490 · fax 866.561.9712 · coburngreenbaum.com